Office of the Attorney General
State of Texas

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May 11, 1998

The Honorable René O. Oliveira
Chair, Committee on Economic Development
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-041

Re: Authority of a home-rule city to increase the statutory penalty for failure to restrict access to aerosol paint (RQ-1074)

Dear Representative Oliveira:

You have requested our opinion regarding the authority of a home-rule city to adopt an ordinance "modeled after Section 485.019 of the Texas Health and Safety Code," and to "set the maximum penalty for violation of that ordinance at a fine of more than one hundred dollars."

Section 485.019 requires a "business establishment that holds a permit under Section 485.012 and that displays aerosol paint" to display the paint in such a manner as to restrict access thereto by minors. A "first violation of this section" may be punished by either a warning or a "civil penalty of $50." After a first violation, the business establishment "is liable to the state for a civil penalty of $100" for each subsequent violation. You advise that the city "would like to set the maximum fine for violation of that ordinance at several times higher than one hundred dollars."

The proposed ordinance prohibits precisely the same conduct as that proscribed by the statute. The only difference is the penalty. In *Clark v. State*, 81 S.W. 722 (Tex. Crim. App. 1904), a state law "provided a punishment of not less than $10 nor more than $25 for betting at banking games and devices." Subsequently, the City of El Paso enacted an ordinance "punishing any person who should pursue, follow, or engage in the bunco business, and fixing a penalty of 'not less than $101 and not more than $500.'" *Id.* The court held that "this conflict between the ordinance of 1891 and the state law in regard to gambling would render the ordinance vicious." *Id.* Likewise, in *Ex parte Goldburg*, 200 S.W. 386 (Tex. Crim. App. 1918), the court said:

> Penalties under ordinances, if the ordinance is the same as the state law, must conform strictly to penalties prescribed by the state law. Such penalties cannot exceed or fall below the penalties prescribed by the state law; that is, where the ordinance pertains to the same matter as that enacted by the Legislature.

Id. at 387; *see also El Paso Elec. Co. v. Collins*, 23 S.W.2d 295 (Tex. Comm'n App. 1930).

Cases in other jurisdictions fully support this proposition. *See, e.g., Pierce v. Commonwealth of Kentucky*, 777 S.W.2d 926 (Ky. 1989); *City of Portland v. Dollarhide*, 714 P.2d 220 (Or. 1986); *Olsen v. Delmore*, 295 P.2d 324 (Wash. 1956); *City of Janesville v. Walker*, 183 N.W.2d 158 (Wis. 1971). We conclude that the City of Brownsville may not adopt an ordinance modeled after section 485.019 of the Health and Safety Code, that sets a maximum penalty for violation at a fine of more than one hundred dollars.

S U M M A R Y

The City of Brownsville may not adopt an ordinance modeled after section 485.019 of the Health and Safety Code, which proscribes the failure of a business establishment to restrict access to aerosol paint, if the ordinance sets a maximum penalty for violation of the ordinance at a fine of more than one hundred dollars.

Yours very truly,

Rick Gilpin

Rick Gilpin
Deputy Chair
Opinion Committee